74-959

FILED

FEB 3

MICHAEL RODAK, JR.

IN THE SUPREME COURT OF THE UNITED STATES

RALPH BAEZ,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE UNITED STATES OF AMERICA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This is a petition to the Supreme Court of the United States praying a grant of Certiorari to the State of California.

HISTORY OF THE CASE

Petitioner herein and his brother, Louis Paul Baez, were charged jointly with nine counts of Grand Theft Auto, receiving stolen property and conspiracy, and Petitioner was charged separately with eight additional counts of Grand Theft Auto and receiving stolen property. On May 14, 1973, trial was commenced in the Superior Court of the State of California, in and for the County of Los Angeles, before the Honorable Ralph A. Biggerstaff, Judge Presiding. Both Defendants were represented by Attorney David Cunningham. On May 18, 1973, the Court found both Defendants guilty of two counts of Grand Theft Auto, two counts of receiving stolen property, and one count of conspiracy. Additionally Petitioner herein was found guilty of two additional counts of Grand Theft Auto and two additional counts of receiving stolen property.

Additionally, Petitioner herein was charged with four prior felony convictions and the Court found three of the prior convictions to be true. Thereafter, on June 7, 1973, the Court sentenced the Defendant to the State Prison for the term prescribed by law on the ten counts of which he had been convicted, providing that counts 3 and 4, Grand Theft Auto and receiving stolen property of the same vehicle should run concurrent with each other; counts 5 and 6, involving Grand Theft Auto and

receiving stolen property of another vehicle, should run concurrent with each other; counts 12 and 13, Grand Theft Auto and receiving stolen property of another vehicle, should run concurrent with each other; counts 14 and 15, involving Grand Theft Auto and receiving stolen property of another auto, should run concurrent with each other; provided further that counts 5 and 6 should run consecutively with counts 3 and 4; that count 11 (receiving stolen property) should run consecutive to the other two sentences; that counts 12 and 13 should run consecutively with the other counts; that counts 14 and 15 should run consecutively to the other counts; and that count 9, conspiracy, should run concurrent with all other counts.

On June 7, 1973, the Petitioner herein filed his Notice of Appeal to the District Court of Appeal.

The District Court of Appeal, recognizing the conflict between the two defendants, appointed separate counsel to represent each of the defendants before the District Court of Appeal, State of California. The appointed counsel for Petitioner herein, one Herbert Blanck, did not raise the question of conflict of interest and one counsel representing both defendants in his brief to the District Court of Appeal.

The judgment of the Superior Court was affirmed by the Court of Appeal of the State of California, Second Appellate District,

Division 5, on September 30, 1974. A Petition for Rehearing (in which new counsel raised for the first time the question of conflict of interest) was denied on October 30, 1974. Subsequently a Petition for Hearing was filed in the Supreme Court of the State of California and on November 27, 1974 the Petition for Hearing was denied.

The issues on which the Petitioner requests this Honorable Court to grant Certiorari directed to the State of California are as follows:

1. Petitioner was denied his right to effective assistance of trial counsel.

2. Petitioner was denied his right to effective representation by appellate counsel.

3. Petitioner was improperly found guilty and improperly sentenced on counts of grand theft and receiving stolen property arising out of the same course of conduct.

This case was a complex one. Petitioner was charged jointly on nine counts, including a conspiracy count alleging fourteen overt acts, and individually eight more counts and in four alleged prior convictions. Twenty-one witnesses testified and forty-eight exhibits (some multiple), were introduced. The defendants, Ralph Baez and Louis Baez, are brothers and Louie's Auto Wrecking was a locale prominent in the testimony.

In a great deal of the testimony the defendants were referred to as "they," "them," "the defendants," "Mr. Baez," or "the defendant" without any clear indication as to which defendant was meant and with no effort on the part of either the Court of counsel to clear up the ambiguity. Examples from the Reporter's Transcript are as follows:

> "Q. They couldn't do what with yard?
>
> "A. No longer work in the yard, that they weren't that busy or something like that. So asked us if we wanted to start helping them take cars apart." (Reporter's Transcript page 5.)
>
> "THE WITNESS: They would say like go out and get this car tonight, you know, and from there just following it, you know, until they would go and get the car." (Reporter's Transcript page 8.)
>
> "Q. Can you relate the conversation to us?
>
> "A. They just told the guy that, to go out that night and get the car and have it down there for us the next morning." (Reporter's Transcript page 17.)

"Q. Did you ever see Mr. Baez loan any tools to anyone?

"A. Yes." (Reporter's Transcript page 47.)

"Q. Did they instruct you as to what you were to do in the process of dismantling the cars?

"A. Take the front end off, the motor, the doors and the interior out." (Reporter's Transcript page 75.)

"THE PROSECUTOR:
"Q. You entered into an agreement with the defendants to dismantle these vehicles at G & L Tire, isn't that right?

"A. Yes." (Reporter's Transcript page 78.)

"Q. Were you ever present when the defendants conversed with any other persons in regard to stealing cars?

"A. Yes sir.

"Q. When was this?

"A. Night or day before one of the cars would be stolen.

"Q. Was this over a period of time these discussions took place?

"A. Whenever they wanted a car, a particular type of car." (Reporter's Transcript page 80.)

"THE PROSECUTOR:
"Q. When you would steal a car, would they tell you what type of car to steal?

"A. I started off -- when I first started, when I first started stealing, they would tell me what kind of cars to steal, but after being there over a long period of time stealing cars. if they had a certain car they wanted to steal, if I couldn't find it I just knew about what other type of car they would want and I would take another one." (Reporter's Transcript page 239.)

"Q. I take it you didn't keep any record as to the amount of cars that you stole for them?

"A. Well like sometimes two or three." (Reporter's Transcript page 240.)

The foregoing are illustrative examples of the failure to discriminate between defendants so that the trier of fact could ascertain

who the speaker was or with which defendant was having a conversation. There are numerous other instances in the trial transcript of this lack of discrimination.

Trial counsel was forced to treat his clients as a group rather than as individuals. The trial court made identical findings as to each defendant on every joint charge. The trial court then imposed the same sentencing pattern on each defendant. Trial counsel was then unable to urge one single fact on which the court could treat the defendants as individuals (Reporter's Transcript pages 463, 464 and 465).

Petitioner waived his right to a jury trial and his right to remain silent. He now urges that both of these waivers were on the advice of counsel which was rendered ineffective by the conflict of interest that the counsel had in attempting to represent both of the defendants in this case. This conflict of interest rendered ineffective the assistance of counsel to which the petitioner was constitutionally entitled under the sixth amendment of the United States Constitution.

This error was carried on on appeal. The Court of Appeal, apparently believing that a conflict of interest existed between petitioner and the co-defendant, appointed separate counsel for each of them. Neither appointed counsel for petitioner or co-defendant Louis Baez raised the question in

the opening briefs of the propriety of trial counsel representing both of the accused. No closing briefs were filed and counsel for the petitioner did not orally argue the case. Only after the filing of the District Court of Appeal's Opinion did new counsel raise the issue for the first time.

There are numerous cases which assert the rule that before one attorney may represent two defendants at trial that both defendants must be advised of their rights to separate counsel and they must waive that right. Campbell v. United States, 352 F.2d 359 and 361; Lollar v. United States, 376 F.2d 243 at 244; Glasser v. United States, 315 U.S. 60 at 70; 86 L.Ed. 680 at 699; People v. Chacon, 69 Cal.2d 765 at 774. The fact that petitioner did not request separate counsel is irrelevant. People v. Chacon, supra, at 774. Moreover, the fact that counsel was retained is of no consequence in determining whether appellant should have been advised of his right to separate trial counsel and whether there must be a waiver of that right. Lollar v. United States, supra, at 244.

Although it was not a part of the record on Appeal, counsel for the petitioner has been advised by the Trial Judge that prior to the commencement of the trial, the question of conflict of interest was raised by the Deputy District Attorney, who was the prosecutor in the case. Thereafter, the

Trial Judge inquired of the defense counsel if he was satisfied to represent both of the defendants, and if he had explored the questions of conflict of interest. Defense counsel replied to the Court that he was willing to represent both of the defendants, and that he did not consider there to be a conflict question in the case. The Court then inquired of each defendant individually if he were willing to be represented by a single attorney, and would waive any right to separate counsel, and both of the defendants indicated their willingness to proceed with a single attorney.

Notwithstanding the very proper inquiry that was made by the Court prior to the commencement of the trial, petitioner contends that the error was nevertheless present because of the fact that a conflict did exist, and that his defense counsel at the trial level had improperly advised him to waive the right to have a separate attorney.

The inadequacy of the representation of petitioner is illustrated by the numerous instances where witnesses refer to the defendants as "they," "them," "the defendants," and "Mr. Baez." Had each Mr. Baez been represented by a separate attorney who was responsible for the interest of a single client, certainly these ambiguities would have been eliminated.

As the Court said in Campbell v. United States, 352 F.2d 359 (1965),

> "an individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the Trial Judge, whether the attorney has made such an appraisal or has advised his clients of the risks."

Petitioner contends here that the damage is just as great to the defendant who has been misadvised by his attorney as one who was not advised at all. As the Court said in Glasser v. United States, 315 U.S. 60 at 70,

> "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

In United States v. Marshall, 488 F.2d 1169 (1974), the Court said,

> "A defendant may knowingly waive his right to separate counsel just as he may knowingly waive the assistance of any counsel, but where an attorney undertakes joint representation and foresees, or should have foreseen, conflicting duties to his clients, he

must suggest separate counsel and make a sufficient disclosure of the conflict that his clients may knowingly waive their rights to counsel. Here counsel's failure in this duty, regardless of whether he was retained or appointed was equally pernicious." (Emphasis added.)

"Citing Criminal co-defendants as co-defendants and the Sixth Amendment: the case for separate counsel," 58 Geo. L.J. 369.

In making this contention to this Court, petitioner is not unaware of United States v. Wisnieski, 478 F.2d 274 (1973), in which the Court held there was no prejudice in one attorney representing eight defendants because of the fact that a searching inquiry was made by the Court as to conflict and full waivers were taken. However, in view of the emphasized language in the Marshall opinion, petitioner suggests that this Court should modify the broad rule of Wisnieski to hold that there is prejudice if an attorney who undertaken joint representation should have foreseen conflicting duties to his clients.

In United States ex rel Hart v. Davenport, 478 F.2d 203, in granting habeas corpus on a conflict situation, the Court said,

> "the legal standard to be applied to a claim of prejudice from joint representation is clear enough. The right to Counsel guaranteed by the Sixth and Fourteenth Amendments contemplates the service of an attorney devoted solely to the interest of his client. The right to such untrammeled assistance applies both prior to trial considering how to plead and during trial."

Additionally, the Court in Hart rejected the Government's contention that because the attorney was privately retained, his actions in rendering ineffective assistance should not be attributed, for Fourteenth Amendment purposes, to the State. The Court said,

> "There remains the final contention that because the attorney was privately retained his actions in rendering ineffective assistance should not be attributed, for Fourteenth Amendment purposes, to the State of New Jersey. See, e.g., United States ex rel Wilkens v. Banmiller, 205 F. Supp. 123 (E.C. Pa. 1962), aff'd 325 P.2d 514 (3d Cir. 1963), cert denied, 379 U.S. 847, 85 S.Ct. 87, 13 L. Ed. 2d 51 (1964). Cf. United States ex rel O'Brien v. Maroney, 423 F.2d 865 (3d Cir. 1970). This contention argues too much. We have never

indicated that the hand of the Fourteenth Amendment is stayed in every case where a defendant is represented by private counsel. What we have previously said is that actions of a privately retained attorney do not for Fourteenth Amendment purposes per se involve state action. Where the questioned conduct of such attorney takes place in the presence of the Court or the state attorney, the state action for vindication of the alleged Fourteenth Amendment deprivation is the failure of the state prosecutor or state court to take necessary action."

While the Supreme Court held in Adams v. United States, 317 U.S. 269, 87 L.Ed. 268 (1942) that a defendant can waive jury trial and counsel (see dissent by Mr. Justice Douglas in which Justices Black and Murphy joined), it is recognized that individual fact situations necessarily will control the outcome of the case. Thus in Peck v. United States, 321 F.2d 934 (1963) although the Court affirmed the convictions of husband and wife who were represented by a single attorney, the Court, citing Glasser said,

"It is well recognized in the Federal Courts that the existence of a conflict of interest on the part of counsel representing two

> defendants deprives the accused of the effective assistance of counsel; decisions dealing with the question of whether or not conflict of interest existed have turned on the particular fact situation in each case."
> (Emphasis added.)

Petitioners contend that the ambiguities in the record herein as set forth in this Petition and in the Appendix attached hereto make it clear that the assistance of counsel was ineffective as to each of the individual defendants and that the resulting conviction is in violation of petitioner's rights under the Sixth and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

ARMSTRONG, VERON & WILBUR

By Robert W. Armstrong

Attorneys for Petitioner

APPENDIX

In addition to the portions of the transcript cited in the Petition herein, the following are *exerpts from the transcript* illustrating where the witness failed to indicate which particular defendant was the subject of the testimony:

Reporter's Transcript page 76, lines 6-13 (by Deputy District Attorney):

> Q. Do you know who owns G & L Tire?
>
> A. Mr. Douglas.
>
> Q. Do you know whether or not Mr. Douglas and the defendants entered into an agreement to rent that location?
>
> A. They had an agreement with some party in between some way or another.
>
> Q. Do you know who that party was?
>
> A. Lucius Marlboro.

Reporter's Transcript page 78, lines 17-23 (by Mr. Wheeler):

Q. BY MR. WHEELER: You entered into an agreement with the defendants to dismantle these vehicles at G & L Tire; isn't that right?

A. Yes.

Q. They owned a junk yard right there at Louie's Auto Wrecking; isn't that true?

A. Yes.

Reporter's Transcript page 80, line 6 - p. 81, line 2 (by Mr. Wheeler):

Q. BY MR. WHEELER: By "they" you are referring to the two defendants in this case; is that correct?

A. Yes.

Q. Was there any discussion about Sergeant Raines being in the area?

A. Yes, sir.

Q. What did they say in regard to him?

A. He is always stopping in and out of the yard. You never know

when he is going to be there.

Q. They gave you the reason why you were dismantling the cars at G & L Tire?

A. Yes.

Q. Were you ever present when the defendants conversed with any other persons in regard to stealing cars?

A. Yes, sir.

Q. When was this?

A. Night or day before one of the cars would be stolen.

Q. Was this over a period of time discussions took place?

A. Whenever they wanted a car, a particular type of car.

Q. Were you present when they instructed another person to steal a particular car?

A. Yes.

Reporter's Transcript page 82, lines 3-7:

Q. Did you hear the defendants instruct him to steal a particular type of car?

A. Yes, sir.

Q. How many times did this occur?

A. Two or three different times I have heard them.

Reporter's Transcript page 239, lines 4-27 (testimony of Mr. Charles L. Carll):

Q. What specific kind of work did you do for them?

A. I drove the truck, delivered, worked in the yard, took cars.

Q. Did you go out and pick up cars for them?

A. Yes.

Q. Did they tell you what type of cars to pick up?

MR. CUNNINGHAM: I will object to the form of the question, your Honor. He said he went and picked up cars. That indicates to me from the previous testimony that he was a delivery person and drove trucks and delivered.

THE COURT: I will sustain the objection on the ground that the question is uncertain since the terms haven't been defined.

What do you mean when you say you picked up a car for the defendants? Did you steal it?

THE WITNESS: Yes.

Q. BY MR. WHEELER: When you would steal a car, would they tell you what type of a car to steal?

A. I started off -- when I first started, when I first started stealing, they would tell me what kind of cars to steal, but after being there over a long period of time stealing cars, if they had a certain car they wanted to steal, if I couldn't find it I knew just about what other type of car they would want and I would take another one.

Reporter's Transcript page 244, lines 1-21:

Q. Have you ever stripped cars there?

A. Yes, I did.

Q. At whose direction?

A. Direction of Louie.

Q. While you were stripping these cars, did you ever give any of the parts of the cars to Mr. Douglas?

A. No.

THE COURT: When you say "Louie," you mean Louis Baez?

THE WITNESS: Yes, Mr. Baez.

THE COURT: All right. Thank you.

Q. BY MR. WHEELER: Do you know whether or not the defendants were leasing this area of the lot that you said you parked the cars in?

A. Yes.

Q. Do you know how much was being paid for the rent of that location?

A. They would pay Mr. Douglas -- maybe Mr. Douglas might want -- Mr. Douglas was constantly picking up seats and things, you know, little stuff we would leave there and they would probably tell Mr. Douglas, you know, "You know you owe for that," or he would probably give him money.

Reporter's Transcript page 245, line 25 - p. 246, line 9 (by Mr. Wheeler):

> Q. BY MR. WHEELER: Do you know who it was that -- you mentioned earlier something about someone that the defendants gave money to pay the rent with. Do you know who that person was?
>
> A. Yes, Lucious sometimes and it would either -- sometimes they would pay Mr. -- sometimes Mr. Douglas would come down the street and give the money to him. On the other hand -- it was all kind of confused at one time there because, you know, Lucius -- by me working there and then Lucius working there -- I don't know how you would say it, but I know Mr. Douglas, he would always get his money, though, from whoever was working there, but he was only getting paid something like once a month.

Reporter's Transcript page 247, lines 5-14:

> Q. Did you ever strip any vehicles at any other locations other than at G & L Tire?
>
> A. Other than G & L Tire?

Q. Yes.

A. Stripped some on Florence at one time, C & H or S & H Body Shop.

Q. Was this for the defendants?

A. Yes.

Q. When was that?

A. That was the end part of '71.

Reporter's Transcript page 251, line 27 - page 252 - page 253, line 14:

Q. After you had stripped a vehicle for the defendants would you ever help load them up or do anything with the parts?

MR. CUNNINGHAM: Just a moment, please. No foundation that he stripped cars that I remember of in the testimony for the defendants. I thought he was talking about Lefty and Raymond.

THE COURT: He said he had worked for the Baez brothers stripping cars, didn't you? Wasn't that your testimony?

THE WITNESS: Yes.

Q. BY MR. WHEELER: What would happen to the parts that you stripped for them?

A. Louie?

Q. Yes.

A. They would usually come down to the yard after you finished, as soon as the traffic slowed down, they would, they would come in and take the parts off the yard with the exception of probably some motors they might leave down in Douglas' because of numbers on them, unless they hit the numbers, then they would bring everything down. Certain parts they would usually leave down there. A lot of stuff they left down there, not much.

Q. What do you mean by hitting members?

A. Serial numbers, identification numbers on a motor or transmission. It would probably be changed like a "1" to a "7" or a "3" to a "8".

Q. How much were yoy being paid to strip the cars?

A. How much was I getting?

Q. Yes.

A. $150 a car just, you know, dismantling them and that is it.

Q. Would you do it by yourself or with someone else helping you?

A. Usually doing it with somebody else.

Q. How much were you being paid to steal a car?

A. That varied. Probably get from, well, $75 all the way to $150 or maybe even $200. It all depended. If it was for somebody else, you know, probably it would be more, but for them it would be in the range of 75 to 150.

Q. How would you be paid? In cash or in check?

A. I would be paid in cash and check sometimes.

Q. Who would pay you?

A. Louie.

Q. Did Louie mainly handle the money?

A. Yes. He handled the money.

Reporter's Transcript page 269, line 28 - page 270, line 28:

Q. What is the most you ever were paid by Louie for taking a car?

A. The most was $150.

Q. $150. And the least you were paid?

A. The least 50.

Q. 50?

A. Yes.

Q. What kind of cars did you receive $50 for?

A. Well, when I first started off I probably was making 50, but after being in the business awhile I got wised up and said that was too cheap. It wasn't worth it.

Q. Later on you asked for how much?

A. I just thought I would ask for whatever I was able to get.

Q. Whatever you were able to get?

A. Like I set my price and usually they would work me down so far and they was in need so bad that they had to give in.

Q. This would be after you had stolen the car?

A. No. This would be sometime before and sometime after.

Q. And you would get paid right on the spot?

A. Sometimes on the spot. It all depends if I needed the money. I usually kept a pocketfull of money but, you know, it all depended. Most of the time they would owe me.

Q. Most of the time they would owe you?

A. Yes.

Q. Did you ever get all paid?

A. They used to pay off all the time a lot.

Reporter's Transcript, page 335, lines 8-12:

Q. You say all the parts of the two or three dismantled vehicles would go up to the yard?

A. Yes.

Q. That is Mr. Baez' yard?

A. Yes.

Reporter's Transcript page 347, lines 6-8:

Q. Okay. That was the car, the first car that you took and stole for Mr. Baez: is that correct?

A. No. That wasn't the first car.

Reporter's Transcript page 370, lines 9-28 (Question by Defense Counsel):

Q. Did they tell you to go out and get this Firebird, as I recall your testifying that?

A. Yes.

Q. When did they tell you that?

A. They told it to me that same time.

Q. What same time?

A. The same evening. I am not for sure now if he came by -- no, he didn't come by my house, I don't believe. I had a telephone. I don't

know if he called or what, I don't know how we came by it, but I know that me and Ricky was together and we went and picked up the Firebird for him.

They want Firebird. We looked, I don't know how long for a nice clean Firebird.

Q. That was the night before you delivered the Firebird; is that correct?

A. That was the night before I delivered the Firebird?

Q. You stole the Firebird and brought it there the next morning; isn't that what you did?

A. Yes. I picked up the Firebird that night and dropped it off at the parking spot.

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Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX B

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent,	)	
v.	)	
LOUIS PAUL BAEZ and RALPH BAEZ, Defendants and Appellants	)	2d Cr. No. 23958 S. C. No. A430774

APPEALS from judgments of the Superior Court of Los Angeles County. Ralph A. Biggerstaff, Judge. Affirmed.

Richard H. Levin, under appointment by the Court of Appeal, for Defendant and and Appellant Louis Paul Baez. Herbert F. Blanck, under appointment by the Court of Appeal, for Defendant and Appellant Ralph Baez.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney

General, and Robert F. Katz and Robert Anderson, Deputy Attorneys General, for Plaintiff and Respondent.

By information, defendant Louis Paul Baez and defendant Ralph Baez were charged in Counts I, III, V, and VII with grand theft auto (Pen. Code, § 487, subd. 3), in Counts II, IV, VI, and VII, with receiving stolen property (Pen. Code, § 496), and in Count IX, with conspiracy to commit the crimes of auto thefts and receiving stolen property (Pen. Code, § 182). Defendant Ralph was individually charged in Counts X, XII, XIV, and XVI with grand theft, auto (Pen. Code, §487, subd. 3), and in Counts XI, XIII, XV, and XVII, with receiving stolen property (Pen. Code, § 496). The information was subsequently amended to allege four prior felony convictions against defendant Ralph. Defendants waived trial by jury. The trial court found defendant Louis not guilty of Counts I, II, VII, and VIII, and guilty of Counts III through VI, and Count IX. Defendant Ralph was found not guilty of Counts I, II, VII, VIII, X, XVI and XVII, and guilty of Counts III through VI, Count IX, and Counts XI through XV. As to Ralph, the court also found 3 of the 4 allegations of prior convictions to be true.

Defendants' motions for new trials were denied. Defendant Louis was sentenced to state prison for the terms prescribed by law, the sentences on Counts III and IV and the sentences on Counts V and VI to run

concurrently with each other. The sentences on Counts V and VI were ordered to run consecutively with the sentences on Counts III and IV. The sentence on Count IX was to run concurrently with all other counts.

Defendant Ralph was sentenced to state prison for the terms prescribed by law, the sentences on Counts III and IV to run concurrently with each other, the sentences on Counts V and VI to run concurrently with each other, the sentences on Counts XII and XIII, to run concurrently with each other, and the sentences on Counts XIV and XV to run concurrently with each other. The sentences on III and IV, Counts V and VI, Count XI, Counts XII and XIII, and Counts XIV and XV were ordered to run consecutively. The sentence on Count IX was ordered to run concurrently with all other sentences. Defendant Ralph's probationary status was revoked in Cases A-279296 and A-427013. The sentences on these cases were ordered to run concurrently with the other sentences.

The Facts

Defendants were initially arrested on April 1, 1972 in connection with a stolen 1971 Chevrolet pickup, which had been observed at defendant Ralph's house by Deputy Sheriff John Hill several hours after taking a stolen vehicle

report from the owner. No complaints were filed against either defendant at that time.

Charles Carll stole and dismantled cars for defendants. Carll called Sergeant Raines of the Los Angeles Sheriff's Department and supplied him with information which caused Raines to place the G & L Tire Company,[1] located a short distance from defendant's place of business (Louie's Auto Wrecking), under surveillance.

Danny Lewis was observed leaving the G & L Tire Company and was subsequently seen to enter Louie's Auto Wrecking, where he engaged in a conversation with defendant Ralph. Lewis left the building carrying an acetylene torch and hoses and re-entered the G & L Tire Company building. Smoke was observed emanating from a canvas-covered cubicle on the property of the G & L Tire Company. Sergeant Bennett went to the cubicle and observed three persons, Danny Lewis, Harold Hall, and John Hall, dismantling a 1967 Pontiac Firebird. Examination of the identification number on the car being dismantled established that it matched that of a car reported stolen. Several other comparisons and examinations were undertaken at the

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[1] Testimony at trial established that defendants leased the facilities known as the G & L Tire Company from the owner, who is not here involved.

G & L Tire Company, from which Raines was able to deduce that the property subsequently described in the information was stolen. In all, Raines recovered parts of cars, license plates and various papers from over 26 stolen automobiles.

From the G & L Tire Company, Raines went to Louie's Auto Wrecking, where he found the defendants and additional stolen property, and he placed defendants under arrest.

It is clear from the record that defendants used the facilities of G & L Tire Company and Louie's Auto Wrecking to receive stolen cars. Carll, Harold Hall and John Hall all testified at great length that they had either stolen or dismantled a number of cars at defendants' directions. There was also testimony that defendants had directed Carll to steal cars.

Contentions

Defendants' first contention on appeal is that trial counsel's failure to raise the issue of the validity of the search denied defendants the effective assistance of counsel. The search in question was that of the G & L Tire Company, where Lewis and the two Halls were discovered dismantling an automobile. Defendants contend that the search was outside the standards set

forth in Chimel v. California, 395 U.S. 752; moreover, that no warrant was produced and this made the search prima facia unreasonable. (Badillo v. Superior Court, 46 Cal. 2d 269.)

It is now well established that if defense counsel's lack of diligence or competence results in the withdrawing of a crucial defense from the case, reducing the trial to a farce or a sham, the defendant has not had the effective assistance of counsel to which he is entitled under the Sixth Amendment. (In re Saunders, 2 Cal. 3d 1033, 1041-1042.) In People v. Ibarra, 60 Cal. 2d 460, 465, the court held defense counsel's assistance to be inadequate, stating, "In the present case the record[2/]

2/ The Record in Ibarra showed the following:

"Following the testimony on the search and seizure, the trial court asked defense counsel if he wished to object to the admission of the heroin. Defense counsel replied, 'Well, your honor, in view of the testimony from the defendant that the object in People's Exhibit WK-1 [the heroin] was not in his possession and was not taken from him, under such circumstances I could not make a motion to object to its introduction. So far as I know I would have no grounds since defendant has denied this was in his possession or taken from him.' The court again inquired, 'I take it therefore that there is no objection offered?' Counsel replied, 'No, your

(con't p. B-7)

demonstrates that defendant's counsel did not know the rule that defendant could challenge the legality of the search and seizure even though he denied that the heroin was taken from him and asserted no proprietary interest in the premises that were entered. [Citations.]" In the instant case, the record is devoid of any showing that it was due to lack of diligence or competence that defense counsel failed to make an objection to the search of the G & L Tire Company facility. As stated in People v. Najera, 8 Cal.3d 504, 517, courts "should not presume counsel's incompetence in the face of a silent record, since tactical decisions may have led counsel to act as he did." The choice of when to object is inherently a question of trial tactics which is particularly outside the field of normal appellate review. (See Henry v. Mississippi, 379 U.S. 443, 451.) The record fails to support defendants' contention that it was due to lack of diligence or competence that defense counsel withdrew a crucial defense from the case.

2/ (con't)
honor;' whereupon the court admitted the heroin into evidence."
(Id., at pp. 463-464.)

Defendants' second contention is that they were sentenced in violation of Penal Code section 654[3/] on Counts IV, VI, XIII and XV for receiving stolen property, since each of the automobiles involved in these counts was also the subject matter of Counts III, V, XII, and XIV, respectively, which were for grand theft. Defendant Louis was convicted and sentenced on Counts III through VI. Defendant Ralph was convicted and sentenced on Counts III through VI and on Counts XII through XV. The sentences for the crimes involving each car were to run concurrently with one another. The total sentences imposed for the crimes involving each car were ordered to run consecutively. Moreover, each defendant was convicted and sentenced for conspiracy to

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3/ Penal Code § 654 provides: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. In the cases specified in sections six hundred and forty-eight, six hundred and sixty-seven and six hundred and sixty-eight, the punishments therein prescribed must be substituted for those prescribed for a first offense, if the previous conviction is charged in the indictment and found by the jury." (Emphasis added.)

commit crimes of automobile theft and receiving stolen property, which sentence was to run concurrently with all other sentences. In People v. Beamon, 8 Cal. 3d 625, 639 the court construed the prohibition against multiple punishments found in section 654 as follows:

> ". . . .This court has thus construed section 654 to be applicable to limit punishment for multiple convictions arising out of either an act or omission or a course of conduct deemed to be indivisible in time, in those instances wherein the accused entertained a principal objective to which other objectives, if any, were merely incidental. The initial inquiry in any section 654 application is to ascertain the defendant's objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct."[Fn. omitted.]

Whether an act or omission is divisible and punishable separately, or is an indivisible course of criminal conduct for which only one punishment is proper, is to be resolved on the facts of each case. (In re Hayes, 70 Cal. 2d

604, 605-606.) Defendants argue that under the facts of this case the term "single objective" applies to defendants' intended end result, i.e., to make money by dismantling stolen cars and selling the parts thereby obtained. We disagree.

The decisions have established that a course of conduct which is indivisible as to the intent and objective of the actor is not made divisible because one of the crimes is completed before the other has commenced. (People v. McFarland, 58 Cal. 2d 748, 760-762.) On the other hand, where many separate crimes even of the same nature are committed over a divisible period of time, they may give rise to multiple violations and punishments. (People v. Quinn, 61 Cal. 2d 551, 556.)

As a general rule, one may not be convicted of both stealing and receiving of the same stolen property. (People v. Briggs, 19 Cal. App. 3d 1034, 1036.) "The actual thief cannot receive from himself the fruits of his larceny." (People v. Taylor, 4 Cal. App. 2d 214, 219.) However, as stated by this court in People v. Williams, 253 Cal. App. 2d 952, 958-959:

> "The defendant's argument that there is an obligation by the state to prove as a necessary element of the crime of receiving stolen property that the original theft of the goods was by someone other than the defendant stems from a mis-reading

of People v. Jacobs (1925) 73 Cal. App. 334 . . . The correct rule is that where it is affirmatively established that the defendant is the thief, he may not be convicted under subdivision 1 of section 496 of the Penal Code if the concealment and withholding of the stolen goods have been a part of his activities connected with the theft. (People v. Tatum (1962) 209 Cal. App. 2d 179 . . . However, such section does not require proof that the defendant was not the thief as a necessary element of the crime. (People v. Marquez (1965) 237 Cal. App. 23 627, 634, 637 . . .; People v. Hansard (1966) 245 Cal. App. 2d 691, 696 . . . While, generally a thief may not be convicted under the above section of 'buying' 'receiving' the goods he has previously stolen, he may be adjudged guilty of violating that section by reason of concealing or withholding such property following his theft, where the theft has been completed and the facts indicate a 'complete divorcement' between a second concealment and the initial concealment after the theft. (People v. Tatum, supra . . . at p. 184.)"

(See also, People v. Taylor, 2 Cal. App. 3d 979, 984; 1 Witkin, Cal. Crimes, § 426, p. 394.)

Here, the record shows that after the cars had been stolen as per defendants' instructions, they were taken to the G & L Tire Company for dismantling. After they were dismantled, certain parts were retained for sale through defendants' business establishment, and what remained of the cars was destroyed in an attempt to conceal the dismantling. We agree with respondent that these later acts constitute a "complete divorcement" between the second concealment and the initial concealment after the theft. (See People v. Williams, supra, pp. 954-956, 959.) The purpose of the protection against multiple punishments is to insure that the defendant's punishment will be commensurate with his criminal liability. (Neal v. State of California, 55 Cal. 2d 11, 20; see also, People v. Bauer, 1 Cal. 3d 368, 378.) Where, as here, a defendant increases his criminal liability by acts performed subsequent to his first violation of the law which make detection of the crime mor difficult or constitute a type of criminal activity different in kind than that previously engaged in (see e.g., People v. Williams, supra), it does not seem reasonable to conclude that only one crime has been committed.

Defendants further contend that the trial court committed error when it sentenced defendants for conspiracy and also for grand theft and for receiving stolen property.

Normally, if the objects of the conspiracy are accomplished, each crime --the conspiracy and the substantive offense-- may be separately prosecuted and punished. (1 Witkin, Cal. Crimes, § 105, p. 100.) However, in the case of In re Cruz, 64 Cal. 2d 178, the court stated that the prohibition of section 654 is violated by a sentence which imposes punishment for conspiracy to commit illegal acts and for the illegal acts themselves if the conspiracy has no object other than the specific acts charged. (See also, People v. Keller, 212 Cal. App. 2d 210, 220.) In Cruz, the information alleged 25 overt acts in furtherance of the conspiracy. The court noted that "it does not appear that any of these acts related to any offense except the grand thefts charged in counts 2 through 4" of the information for which the defendant was convicted. (64 Cal. 2d at 180.) The Cruz court concluded that since both the conspiracy and the substantive crime had but one objective, the punishment for both violated section 654. In the instant case, the trial court found that defendants committed several overt acts unconnected with the substantive crimes for which defendants were convicted. These overt acts were in furtherance of the conspiracy and its objectives. They were not subsumed within the substantive crimes for which defendants were convicted. Under such circumstances, there was no error.

Defendant Louis individually raises the contention that the evidence was insufficient to find him guilty of receiving stolen property (Count VI). Defendant Ralph individually raises the contention

that the evidence was insufficient to support his convictions under Counts III, V, XII and XIV for grand theft auto(s).

In appellate review the function "begins and ends" with the discovery of substantial evidence supporting the verdict. (People v. Bassett, 69 Cal. 2d 122, 138, quoting Crawford v. Southern Pac. Co., 3 Cal. 2d 427, 429.) On appeal, the reviewing court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact that the trier could reasonably deduce from the evidence. (People v. Kunkin, 9 Cal. 3d 245, 250; People v. Reilly, 3 Cal. 3d 421, 425.) The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (People v. Crowe, 8 Cal. 3d 815, 833-834; People v. Mosher, 1 Cal. 3d 379, 395; People v. Hillery, 62 Cal. 2d 692, 702.)

With respect to the contention raised by defendant Louis, the elements of the offense of receiving stolen property are: (1) the property found inthe possession of the accused was acquired by means of theft; (2) the accused received, concealed, or withheld such property from its owner; and (3) the accused knew that the property was stolen. (People v. Martin, 9 Cal. 3d 687, 695.) Defendant Louis contends that the evidence failed to establish "conscious possession necessary to infer knowledge of the stolen property." The evidence adduced at trial shows an ongoing criminal enterprise in which hirelings, under defendant

Louis' direction, stole a number of cars and dismantled them at the G & L Tire Company facility to enable defendant Louis to sell, through his business, the parts thereby obtained. The stolen property described in Count VI was discovered at the G & L Tire Company, a facility which both defendants leased and utilized to promote their criminal activities. Moreover, this property had been stolen at defendant Louis' express direction. This is more than adequate evidence to sustain the conviction under Count VI. (People v. Redmond, 71 Cal. 2d 745, 755-756; People v. Bassett, 69 Cal. 2d 122, 139.)

With respect to the contention raised by defendant Ralph that there is no evidence that he actively took part in the taking of the property as set forth in Counts III, V, XII and XIV, it is well settled that one who aids, abets, or encourages another in the commission of a crime is guilty as a principal. (People v. DeJean, 249 Cal. App. 2d 220, 227; 1 Witkin, Cal. Crimes, § 43, pp. 45-46.) The record reflects evidence of numerous instances of active participation by defendant Ralph in the planning for the theft of automobiles and for their dismantling. The contention is clearly without merit.

Defendant Ralph's final contention is that the revocation of his probation was in violation of the due process standards set forth in Morrissey v. Brewer, 408 U.S. 471 and People v. Vickers, 8 Cal. 3d 451. Defendant Ralph's probation was revoked on the basis of his

criminal convictions in the instant case. He contends that the trial court erred in that (1) he was not advised of the nature and effect of the proceedings which resulted in his probation revocation (i.e., that his trial on the charges contained in the information could serve as a vehicle by which his probation could be terminated (see In re Law, 10 Cal. 3d 21)); and (2) the trial judge revoked his probation without making a written statement of the evidence relied upon and the reason for revocation.

Neither contention has merit. As stated in In re Edge, 33 Cal. App. 3d 149, 157, 158:

> ". . . . It follows that insofar as the revocation of parole [we add: or the revocation of probation] may be based on actual conviction of other crimes, the issues underlying guilt need not be reproven. . . .
>
> "It is implicit in the language and factual setting of Morrissey that the court in prescribing a preliminary hearing procedure only when the charges against the parolee (or probationer) are not based upon criminal charges which are being prosecuted under the criminal law. The high court did not intend to duplicate criminal procedures. . . .
>
> "The preliminary hearing requirement of Morrissey are to assure that a parolee [or probationer] is not returned to prison to wait an

extended period for an in custody revocation proceeding hearing without having had a hearing to determine if there is probable cause to believe he is guilty of the violation charged."

(See also, People v. Dominguez, 35 Cal.App.3d 18, 21; In re Frias, 34 Cal.App.3d 88, 92; In re Scott, 32 Cal.App.3d 124, 127.)

Defendant's reliance upon In re Law, 10 Cal.3d is misplaced. In Law (at 27-28), the court held that as a judicial time-savings procedue, a defendant-probationer's preliminary hearing on an information could serve the dual function of establishing probable cause to allow the return of the prbationer to in-custody status. In such case, the probationer must be given fair notice of the nature and effect of a hearing intended to serve such a dual purpose. However, in the instant case no attempt was made tc revoke defendant's probation until after he had been convicted of the charged felonies. The existence vel non of a preliminary hearing procedure to establish probable cause as set forth in Morrissey, Vickers, and Law is immaterial to this case. As to defendants' guilt, the convictions are unimpeachable. Moreover, since the same judge presided over both the trial and the probation-revocation hearing, there was no danger that defendant's probation could be revoked on an inaccurate representation of the facts (i.e., that he was not the person convicted, or the probation report or complaint charing a violation contained

misinformation. (See, In re Edge, supra, at pp. 157-158.) Morissey and its progeny were not intended to create an inflexible structure for parole and probation revocation proceedings. (Morrissey v. Brewer, supra, at p. 490.) Where, as here, such a hearing would serve no useful purpose, it would be illogical to read those cases as mandating that one be held nevertheless.

The second prong of defendant's attack on the revocation of his probation deals with the failure of the trial judge to set forth a statement of reasons for the revocation and the evidence relied upon in accordance with the requirements of People v. Vickers, supra.

In People v. Calais, 37 Cal.App.3d 898, 902, the court was confronted with the identical problem now before this court. There, the court stated: "Although no formal statement of reasons was given for the revocation, none was required under the circumstances since defendant was present with counsel and had been appraised of the charges." In the instant case, defendant was represented by counsel at all stages of the trial and the revocation hearing and he was apprised of the basis for the revocation of his probation -- the instant criminal charges for which he was convicted. We are of the opinion that under these circumstances letter-compliance with the guidelines set forth in Vickers is not

mandated. Reference to the Vickers guidelines[4/] convinces us that due process for a defendant does not necessarily require that every element therein set forth be followed to the letter under whatever circumstances. Since, as previously noted, defendant cannot challenge the facts supporting his convictions for felonies, and the revocation of his probation was premised upon those convictions, it is obvious that several of the requirements set forth in Vickers are inapplicable to varying degrees. We conclude that the court did not intend the standards which it enunciated in Vickers to be immutable, but rather, guidelines to assist in the critical evaluation attendant to the review of any revocation hearing: has the defendant therein been afforded due process of law. We believe that in the instant case he has. Defendant points to no specific injury or prejudice incurred by reason of the failure of the court to set forth in writing a statement of its reasons for revoking

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4/ The due process standards of the revocation hearing are: (a) written notice of the claimed violations; (b) disclosure of the evidence against the probationer; (c) opportunity to be heard and to present witnesses and other evidence; (d) the right to confront adverse witnesses; (e) a neutral and detached hearing body; and (f) a written statement of the factfinders as to the evidence relied on and the reasons for revocation.

defendant's probation.[5/] In the face of a silent record and inability on the part of defendant to show how he has been injured by the court's omission, we will not presume that defendant's right to due process has been violated.

The judgment is affirmed.

NOT FOR PUBLICATION.

STEPHENS, J.

We concur:

KAUS, P. J.

HASTINGS, J.

5/ This in itself would preclude defendant from successfully contending that he had been denied due process of law. (People v. Sirhan, 7 Cal.3d 710, 731.)

Los Angeles, Cal. [illegible] 19

TITLE { THE PEOPLE / RALPH BAEZ } No. 23958

The Court

Petition for rehearing denied.

CLAY ROBBINS, *Clerk*

26778-112 8-74 6M ⓓ OSP

APPENDIX C

APPENDIX D

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

NOV 27 1974

I have this day filed Order

HEARING DENIED

In re: [illegible] *No.* [illegible]

[illegible]

vs.

[illegible]

Respectfully,

G. E. BISHEL
Clerk

SS330-577 7-74 SM OSP

APPENDIX D

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

NOV 27 1974

I have this day filed Order

HEARING DENIED

In re: [illegible] *No.* [illegible]

[illegible]

vs.

[illegible]

Respectfully,

G. E. BISHEL
Clerk

89533-077 7-74 SM OSP